No. 15,220

United States Court of Appeals

For the Ninth Circuit

GLEN EARL GRIGG,
Appellant,

vs.

SOUTHERN PACIFIC COMPANY,
a corporation,
Appellee.

Appeal from Judgment of the United States District Court for the Northern District of California, Northern Division.

Honorable Sherrill Halbert, Judge.

APPELLANT'S PETITION FOR A REHEARING.

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APPELLANT'S PETITION FOR A REHEARING.

To the Honorable Dal M. Lemmon, James Alger Fee, and Richard H. Chambers, Circuit Judges:

The Petitioner, Glen Earl Grigg, petitions for a rehearing in the United States Court of Appeals, after decision by said Court affirming judgment of the United States District Court, and in this connection respectfully shows:

GROUNDS FOR REHEARING.

1. The decision of this Court failed to determine the question as to whether the duty of the defendant

railroad was a non-delegable duty. In fact the duty was a joint duty upon the part of the railroad and the consignee.

2. The decision of this Court provided that petitioner herein raised the issue of negligent use of the railroad's land for the first time on this appeal. In fact petitioner herein asserted the issue of negligent use of the railroad's land and premises in the trial Court.

3. The Court in this decision determined that custody and control of livestock in a railroad's corral at a termination point is the responsibility of the carrier until either the consignee appears and takes charge of the livestock or until a new contract of shipment is made. In fact the custody of livestock within a railroad's corral remains the responsibility of the carrier until the livestock has been removed from the carrier's premises.

4. The Court determined in this decision that jurisdiction existed in the U. S. District Court. In fact, the Petition of Removal filed by defendant railroad herein was premature and that the State Court continued to have jurisdiction over the action while plaintiff's Motion for Relief from the dismissal of defendant Coon was pending and while plaintiff's Motion for Continuance was pending.

5. The decision of this Court does not take into account the implied duties created by California Agriculture Code, Section 422 and Volume 45, U. S. Code Sections 71 and 72 which require carriers to maintain

adequate corrals and pens not only for the protection of the livestock, but for the protection of the public at large.

AUGMENTED FACTS.

There is exhibited to this Petition for Rehearing the plaintiff's Notice of Motion to Amend Complaint to conform to Evidence, his Motion to Amend Complaint to Conform to Evidence, and his Second Amended Complaint, all of which were filed in the District Court on April 6, 1956, and which Motion was subsequently denied by the Court on July 16, 1956. (Transcript page 52.)

The plaintiff in designating the record to be prepared on appeal designated for inclusion in that record his proposed Second Amended Complaint. Through inadvertence, the said Second Amended Complaint which had been filed in conjunction with the Motion to Amend Complaint was not included in the record on appeal, and that the said failure to include same was overlooked by counsel for the plaintiff.

Following the entry of the Opinion in this case on June 28, 1957, the plaintiff requested that the said Notice of Motion to Amend Complaint to Conform to Proof and that Motion accompanying same, together with the proposed Second Amended Complaint be forwarded to the Clerk of this Court as a supplemental record for inclusion in the record of the proceedings in this matter.

Additionally, and out of an abundance of precaution, the petitioner herein attaches said documents to this petition as exhibits thereto.

LEGAL ARGUMENT.

1. THE DUTY OF CARE BY THE RAILROAD WAS NON-DELEGABLE AND A JOINT DUTY OF CARE THUS EXISTED.

In the opinion of this Court affirming the decision of the United States District Court, the Court concluded that the trial court properly found that the horses and mules on December 17 were in the sole possession, custody and control of Mr. Coon. (Page 8, Opinion). That the carrier surrendered control of the horses and mules on December 16 and it was not until a diversion order was issued on December 18 that the carrier resumed the control. The substance of the Court's opinion provides that the issue of "control of livestock" is a matter of agreement of the parties or the physical presence of the owner or consignee. Such a construction completely ignores the actual fact that the horses and mules were in the Southern Pacific corral, on Southern Pacific's land under the observation of the Southern Pacific's corral master and being restrained within facilities which both State and Federal law require to be maintained by a carrier as an inherent facility in the transportation of livestock for hire.

Further, the said animals were in the Southern Pacific Company corral, following carriage from Barstow, California, which carriage commenced on

Wednesday, December 15, at 2:10 A. M. and which carriage ceased at Sacramento, California, on Thursday, December 16, at 10:30 A. M. some 412 miles distant from Barstow. Further, the animals were unloaded at Sacramento after an elapse of 32½ hours time in transit from Barstow to Sacramento, which time elapse exceeded the time stated in the Federal statutes and was just 3½ hours from exceeding the State law. This evidence demonstrates that the animals were discharged at Sacramento for rest and feeding and remained in the control and custody of the railroad.

Further, assuming that Sacramento was the terminal point of shipment of these animals, nevertheless they were held on Southern Pacific's land in a Southern Pacific corral under the observation of Southern Pacific employees and the duty and responsibility of a carrier does not cease upon termination of transit but would continue within the legal category of a bailee relationship until the property or animals *were removed from the premises of the railroad company.*

A duty of a railroad is a non-delegable duty unless expressly made delegable by a statute. At pages 35 to 37 of the appellant's Opening Brief, this law was discussed. That law therein recited is incorporated herein by reference and not repeated for brevity's sake.

Section 2120 of the Civil Code of California provides as follows:

"2120. (Notice when freight not delivered.) If, for any reason, a carrier does not deliver

> freight to the consignee or his agent personally, he must give notice to the consignee of its arrival, and keep the same in safety, upon his responsibility as a warehouseman, *until the consignee has had a reasonable time to remove it.* If the place of residence or business of the consignee be unknown to the carrier, he may give the notice by letter dropped in the nearest postoffice." (Emphasis added.)

Section 2121 of the Civil Code of California provides:

> "2121. (When consignee does not accept.) If a consignee does not accept *and remove freight within a reasonable time* after the carrier has fulfilled his obligation to deliver, or duly offered to fulfill the same, the carrier may exonerate himself from further liability by placing the freight in a suitable warehouse, on storage, on account of the consignee, and giving notice thereof to him." (Emphasis added.)

Both Sections contemplate a responsibility on the part of the carrier which continues *until such time as the shipper's property has been removed from the premises of the railroad.* The same theory of law would be applicable to livestock. Until they are actually removed, *there is a joint and dual duty and responsibility to restrain the livestock to prohibit them from escaping.*

It is to be noted in the facts of this case that it was admitted by the Southern Pacific agent that (1) no receipt was given for the animals until they arrived at Santa Rosa, California; and (2) that no written

permission was given by the consignee to care for or feed the animals in Sacramento; and (3) that no payment was made to the railroad for the transportation of the animals until they had been delivered in Santa Rosa.

This Court's opinion is based primarily upon the following sentence quoted from page 9 of the Opinion as follows:

> "As against the public, outside the expressed contract, the animals could have been in the carrier's custody *if the consignee had not actually taken charge of them or if he had returned the care of the animals to the carrier.*"

The petitioner vigorously disagree with the holding that custody and control of the livestock must be viewed in the limited light that either a new contract of carriage has been signed or that the consignee might be on the premises feeding the animals. Custody and control must be viewed in the light of the legislative enactment requiring the maintenance of adequate pens and corrals and must further be viewed in the light that so long as the livestock are retained upon the carrier's land or premises that said carrier owes a duty to the public to exercise reasonable care to prevent the animals from escaping and injuring people.

The duty exists on the part of the railroad and the consignee until such time as the livestock are *removed from the property of Southern Pacific Company by the consignee.* The mules and horses in this case were never removed from Southern Pacific's property, but

were always upon the Southern Pacific's premises and property until they escaped.

It is respectfully submitted that the Railroad's duty in this instance was a non-delegable duty and that that duty continued so long as the livestock were held on Southern Pacific property, regardless of any technical attempt to change possession or custody by virtue of any document or contract to which the public at large was not in privity. That since the trial court has found as a fact that the livestock escaped from the corral through the negligence and carelessness of Coon, which negligent conduct was observed by Southern Pacific employees within two (2) hours of the accident, then that negligence is chargeable to the Railroad since they owed a joint or dual duty to the public at large.

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2. THE PETITIONER HEREIN RAISED THE ISSUE OF NEGLIGENT USE OF THE RAILROAD'S LAND IN THE TRIAL COURT.

The petitioner did not await until the time of the appeal to urge and raise the question of negligent use of the railroad's land but that said issue was continuously before the trial Court either expressly by the plaintiff's pleading or impliedly in the manner by which the trial was conducted by plaintiff.

Rule 15 (b) Federal Rules of Civil Procedure, provides in part as follows:

> "Amendments to conform to the evidence. When issues not raised by the pleadings are tried by the express or implied consent of the parties,

they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect result of the trial of these issues * * *."

Evidence that the issue of negligent maintenance of the Southern Pacific property was an issue raised either expressly or by implication and tried is as follows:

(1) Plaintiff's complaint charges the defendants and each of them with *negligence and recklessness in their care, custody, control, ownership and maintenance of said horses and mules so as to allow them to stray on the highway.* That language, particularly that of "Maintenance" carries with it the obvious implication of holding, restraining, maintaining, holding animals within a corral, or confining the animals. Both of the defendants were charged with not only the negligent control and custody of the animals, but also with the negligent maintenance of them;

(2) That this question of law was argued before the trial court upon the close of plaintiff's case and legal authority was cited to support the proposition commencing at page 346 of the transcript and running through to page 377 of the transcript.

(3) In the testimony of the following-named witnesses at the following designated portions of the transcript, the issue of the negligent mainte-

nance of the strand wire fence outside of the major wooden corrals was raised in the case, tendering the issue of the fact that the railroad had furnished an unsafe place to keep the livestock;

(a) Testimony of Anthony Perine, pages 156 to 157;

(b) Testimony of Officer George Houck, transcript pages 183 to 185;

(c) Testimony of Don Courtney, transcript pages 242 to 243, and page 256 to page 259; pages 261 to 262.

(d) Testimony of Sigmund Fisher, pages 316-317.

The above testimony of Mr. Perine, Mr. Houck, Mr. Courtney, and Mr. Fisher, as designated, all relate to evidence showing inadequacy of a wire fence surrounding the outside corral located on Southern Pacific's property. The testimony demonstrated that said inadequate wire fence was maintained with the full knowledge of the Southern Pacific Company and as Mr. Courtney testified, mules and horses could escape from it easily. This testimony was connected up with testimony in conjunction therewith showing that there were immediately accessible rights of ways and public roads from the point of that inadequate wire fence directly to the freeway upon which the animals were struck. That testimony was also connected up with the testimony of Mr. Perine demonstrating that the Southern Pacific employees knew that the said horses and mules were being held in

said inadequate wire fence immediately prior to the happening of the accident.

Such evidence obviously comes within the provisions of Rule 15, Subparagraph (b) Federal Rules of Civil Procedure, as an express or implied issue which was tried.

It is submitted that such testimony and evidence demonstrates that one of issues tried in this case was *that the railroad had furnished to Mr. Coon an unsafe place to keep the livestock and that the railroad had knowledge that said livestock was being kept in such unsafe place.* The Court rendered a finding based upon evidence that the animals had escaped from the corral, and that Mr. Coon negligently and carelessly permitted and allowed the horses to escape and stray upon the highway.

The objectives of Rule 15 Federal Rules of Civil Procedure (hereinafter termed F. R. C. P.) is to dispose of law suits on the merits of a case as opposed to technical disposition on procedural objections. See *Moore v. Illinois Central Railway Company,* 24 F. Supp. 731, *Scott v. Baltimore & Ohio Railway Company,* 151 F. 2d, 61.

Further, under Rule 15, F. R. C. P. leave to amend should be freely given in order to arrive at a just decision in the case. See *Maryland Casualty Company v. Rickenbacker,* 146 F. 2d 751, *Atlantic Coast Line Railway Company v. Mims,* 199 F. 2d 582.

Similarly it has been held that an amendment may be permitted even after dismissal. See *U. S. v. New-*

bury Mfg. Co., 123 F. 2d 453 and *Acme Distributing Co. v. Rorie,* 183 F. 2d 694.

Issues tried with the expressed or implied consent of the parties shall be treated in all respects as if they had been raised in the pleadings. In fact, it has been held that a Court should make findings on issues raised by evidence even though not contained in the pleadings. See *Lewis v. Coe,* 132 F. 2d 589.

Even in the Appellate Court, the lack of an amendment should not affect the judgment in any way. Where evidence is introduced which raises new issues and there being no objection, it has been held that a Court would not err in considering the new issues even though no application was made to amend. See *Underwriters Salvage Company of New York v. Davies & Shaw Furniture Company,* 198 F. 2d 450; see also *Menefree v. W. R. Chamberlin Company,* 183 F. 2d 720.

It has also been held that if justice requires, the Court may remand a case to permit Amendment of Complaint for trial on the amended issues. See *Champ v. Atkins,* 128 F. 2d 601.

It is submitted that under the law and circumstances existing here, the Amended Complaint submitted by plaintiff should have been granted to conform to the proof made by the evidence which demonstrated that the defendant railroad allowed a negligent condition to exist upon their land which resulted in injury to a third party.

It is submitted that the issue was not only raised by the pleadings, in pleading negligent "maintenance" of the animals, but was also tried by express or implied consent of the parties.

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3. THE CUSTODY AND CONTROL OF THE LIVESTOCK IN A RAILROAD'S CORRAL IS JOINT CUSTODY AND CONTROL OF THE RAILROAD AND THE CONSIGNEE.

The Opinion of this Court affirming the decision of the District Court holds in effect that when livestock are placed in a corral at what purports to be the terminal point of the shipment, that the said railroad loses custody and control of said animals, and that the custody and control becomes that solely of the owner or consignee thereof. This determination was made by the Court despite the fact that the Southern Pacific Company admitted that (1) they had not received any receipt for the animals, and (2) that they had not been paid for the animals, and (3) that the animals had not been removed from their corrals and premises. The Restatement of Torts, Section 318 provides that if an actor permits a third person to use land or chattels in his possession, that person is under a duty to exercise reasonable care so as to control the conduct of that person, to prevent him from harming others in the use of that property. Thus, under this theory of law, the Southern Pacific Company, in permitting the consignee to use its corrals and property, had a

duty of care to the public and did not prudently discharge the duty.

In *Porter v. Thompson,* 74 C. A. 2d 474, the owner of property, maintaining a cattle auctioneering corral thereon, was held liable when cattle being auctioned by a third party escaped and injured persons. While it is true that the auctioneer had control and custody of the animal or animals which he was auctioning, it is likewise clear that the owner of the property had sufficient custody and control to require the exercise of reasonable restraint of animals on his land. He owed a duty to the public, as was found in that case. Civil Code, Sections 2120 and 2121 of California demonstrate a control and possession of property held by a railroad as being with the railroad *until such time as that property is removed from the premises of the railroad.*

The evidence conclusively demonstrated that the mules were held on Southern Pacific property until they escaped, that the two railroad cars which had originally transported them to Sacramento were held alongside of the corral and were subsequently used for reshipment of the animals to Santa Rosa, and that no receipt had been taken from the consignee for the animals when they arrived in Sacramento, and no payment for transportation was made for the animals until after they reached Santa Rosa. These facts, undisputed in the record, demonstrate a joint or dual control and custody of the animals sufficient to raise the duty of care by Southern Pacific to the public at large.

4. THE JURISDICTION OF THE UNITED STATES COURTS IN THIS MATTER IS IN SERIOUS CONTENTION.

The Petitioner herein has thoroughly set forth his position as relates to the jurisdiction of the United States District Court in this case, basing it primarily on the grounds that the case has been improperly removed. In the Opinion of the Court affirming the judgment of the District Court, no comment was made as to the fact that the plaintiff had moved the Superior Court to relieve himself of the motion to dismiss as to Mr. Coon. That motion was still pending at the time the Petition for Removal was filed by the defendant. Further, in conjunction with that motion for relief from the dismissal of Mr. Coon, there existed a motion to continue the cause for the purpose of securing service of process. In the case of *Southern Pacific v. Haight,* 126 F. 2d 900, the Court observed that a State Court is not precluded per se by the filing of a petition, but that said State Court retains jurisdiction to determine its jurisdiction and the merits of an attack upon such petition for removal. Since the filing of a Petition for Removal does not per se suspend and rescind the jurisdiction of a State Court, and because of the fact that motions were pending at the time of filing for removal herein, the Petition for Removal in this case was premature and the Federal Court was without jurisdiction herein.

5. THE DECISION FAILS TO APPLY CALIFORNIA AND FEDERAL STATUTES PERTAINING TO SHIPMENT OF LIVESTOCK.

This is a case of first impression involving the duty of care of a railroad engaged in the interstate shipment of livestock for hire as to the general public at large, and as relates to the operation of the corral facilities which the law requires such a railroad to maintain as regards to the general public at large. It is a case to determine whether the railroad can delegate its duty of care owed the public, under circumstances of maintaining livestock within its corrals, and is a case of utmost importance to the general public throughout this country.

A technical distinction has been made interpreting the pleading of the plaintiff as not embracing the issue as to the negligent maintenance of the property of the defendant, and that therefore the plaintiff is not entitled to recovery since no duty was owed.

In *Mering v. Southern Pacific Company,* 161 C. 297, it is provided that even though an owner may agree to accompany livestock, the company still has the duty to provide adequate feed, water, and properly equipped pens for their resting and feeding. Obviously, this decision implies an obligation and duty upon the part of the carrier to restrain the animals. Section 422 of the Agricultural Code of California requires a maintenance of adequate pens and corrals as does Volume 45, United States Code, Sections 71 and 72.

In 13 *Corpus Juris Secundum,* Carriers, Section 43, it is stated that adequate pens and corrals must be maintained by carriers who are transporting livestock for hire *so as to prevent animals from escaping and a failure to fulfill this duty will render the carrier liable for any loss or injury sustained.* This rule of law was announced also in *Texas Railway Company v. Bigham,* 28 Southwestern 162, and in *Texas and N. O. R. Company v. Lide,* 144 Southwestern 2d 685; also in *Brook and Olson v. Payne,* 181 Northwestern 803, it was provided that a railroad has a duty to maintain adequate corrals to prevent escape of animals.

In 3 *Shearman on Negligence,* Section 447, it was stated:

> "Railroad companies have no power to lease their roads or to delegate their public duties without express statutory authority; and therefore a company which attempts to do so remains liable for injury suffered through the negligence of anyone operating any part of its road with its consent."

In *Seay v. Southern Railway Company,* 37 Southwestern 2d 535; *Los Angeles and S. L. and R. Company v. Umbaugh,* 123 Pacific 2d 224; *Missouri Pacific Railway Company v. Newton,* 168 Southwestern 2d 812; and *Clifford v. New York Central,* 97 New York Supp. 954, it was held that *a railroad company remains liable where it has attempted to delegate its public duties.* In the *Los Angeles and S. L. R. Company v. Umbaugh* case, supra, it was held that that

rule of law applies even where the Interstate Commerce Commission has approved the delegation. In this case, the railroad company has sought to delegate to Mr. Coon its obligation to the general public to properly care for and restrain the animals that were held in the Southern Pacific's corral and to prevent their escaping and injuring people. Under the law of the cases above cited, such delegation is improper and the duty remains with the railroad as well as the person to whom that duty was sought to be delegated to see that reasonable care is exercised to prevent livestock from escaping from such corrals and injuring people.

In *Honaman v. Philadelphia,* 332 Pennsylvania 335, 185 Atlantic 750, and in *Stevens v. Pittsburgh,* 129 Pennsylvania Super., page 5, 198 Atlantic 655, the Courts held municipalities liable and owing a duty to the public when employees of said municipalities fail to control negligent conduct of third parties when such conduct was known to the park employees and created an unreasonable risk to persons outside of the park. In this case, the *Southern Pacific Company's employees had actual notice within two hours of the accident that Mr. Coon was negligently conducting himself in regard to the restraint of the livestock, and that a negligently maintained fence existed on the railroad's property, and that said livestock could easily escape therefrom along public roads immediately adjacent to the corral and cause injury to third persons.* The failure to control the negligent

conduct of Mr. Coon, and to correct the negligently maintained conditions then existing upon the railroad's property was the proximate cause of this accident.

It is respectfully submitted that this Court should grant the plaintiff appellant's petition for rehearing and that this Court should reverse the decision of the United States District Court.

Dated, San Francisco, California,
July 22, 1957.

Respectfully submitted,

BARNETT & ROBERTSON,
CHARLES J. MILLER,
By RODNEY H. ROBERTSON,
Attorneys for Appellant and Petitioner.

(Appendix Follows.)

Appendix.

Appendix

In the United States District Court for the Northern District of California, Northern Division

No. 7317

Glen Earl Grigg,
Plaintiff,
vs.
Southern Pacific Company, etc., et al.,
Defendants.

NOTICE OF MOTION TO AMEND COMPLAINT TO CONFORM TO EVIDENCE

To: Southern Pacific Company, Defendant, and
To: Devlin, Diepenbrock & Wulff, its attorneys:

You Will Please Take Notice That on Monday, the 23rd day of April, 1956, at 9:30 o'clock A.M. of said day, at the courtroom of the above entitled court located at the Federal Building, Sacramento, California, plaintiff will move the court for its order allowing the filing of the annexed Second Amended Complaint to conform to the evidence adduced at the trial of the said matter.

Said motion will be based upon the evidence, both oral and documentary adduced at the trial of the

matter, all exhibits admitted, and all the papers, pleadings and other documents on file herein, and the file of the case.

Dated: April 6, 1956.

Barnett & Robertson, Charles J. Miller,
By Charles J. Miller,
Attorneys for Plaintiff.

In the United States District Court for the Northern District of California, Northern Division

No. 7317

Glen Earl Grigg,
Plaintiff,
vs.
Southern Pacific Company, etc., et al.,
Defendants.

MOTION TO AMEND COMPLAINT TO CONFORM TO EVIDENCE

Pursuant to Rule 15(b), plaintiff moves the honorable court for its order allowing the filing of the annexed Second Amended Complaint to conform to the evidence adduced at the trial of the above matter.

This motion is based upon the evidence, both oral and documentary adduced at the trial of the matter, all exhibits admitted, and all the papers, pleadings, and other documents on file herein, and the file of the case.

Dated: April 6, 1956.

Barnett & Robertson, Charles J. Miller,
By Charles J. Miller,
Attorneys for Plaintiff.

In the United States District Court for the Northern District of California, Northern Division

No. 7317

Glen Earl Grigg,
Plaintiff,
vs.
Southern Pacific Company, etc., et al.,
Defendants.

SECOND AMENDED COMPLAINT

Plaintiff complains of defendants, and for causes of action alleges:

I.

That at all times mentioned herein the defendant Southern Pacific Company was, and now is, a corporation organized and existing under and by virtue of the laws of the State of Delaware, and doing business in the State of California, and other states, and at all times herein mentioned was, and now is, engaged in the business of a common carrier by railroad in interstate commerce in the State of California and other states.

II.

Plaintiff does not know the true names of the defendants designated herein by the fictitious names of

First Doe to Sixth Doe, inclusive, and plaintiff prays leave to substitute their true names when the same become known to him and to substitute appropriate charging allegations concerning said fictitiously designated persons.

III.

That at all times mentioned herein, the said defendant, Southern Pacific Company, owned, operated and maintained railroad lines in and about the City of Sacramento and warehouses, corrals and appurtenant properties and facilities, used in the operation in said railroad by said defendant. That at all times mentioned herein Park Overpass was and is a part of U. S. Highway 40, running in a generally easterly and westerly direction and is located approximately one mile west of Sacramento, California.

IV.

That on or about Friday, December 17, 1954, at or about the hour of 6:15 o'clock p.m. of said day, the plaintiff, Glen Earl Grigg, was operating a 1955 Cadillac automobile sedan, license No. California 2X10758, which automobile was owned by said plaintiff, in a generally easterly direction on the said Park Overpass, U. S. Highway 40, about one mile west of Sacramento, California, and that said plaintiff was proceeding on said highway east towards Sacramento, California.

V.

That on December 16, 1954, defendant Southern Pacific Company, acting as a common carrier for hire,

brought to its corral located at Broderick, California, a shipment of certain horses and mules consigned to one H. L. Coon; said horses and mules were then and there unloaded into said corral owned by defendant Southern Pacific Company and used by said defendant in the operation of said railroad by said defendant; said horses and mules were then held upon the property of defendant Southern Pacific Company pending determination of final destination of said shipment of horses and mules, which final destination was, on December 18, 1954, determined to be Santa Rosa, California.

VI.

That on December 17, 1954, defendant Southern Pacific Company was so negligent, careless, and reckless in the operation, ownership, and maintenance of said corral and premises as to allow said horses and mules to escape therefrom and stray upon the said Park Overpass on U. S. Highway 40 and into and upon the main travelled portion of said highway, and into the path of the plaintiff's oncoming car, and that at said time and place, the car of plaintiff was caused to be struck by one or more of said horses or mules with great force and violence, severely damaging the automobile of plaintiff and causing plaintiff to sustain the personal injuries hereinafter set forth.

VII.

That by reason of said wrongful, careless and negligent acts, omissions and conduct of the defendant

Southern Pacific Company and its agents, servants and employees, and as a direct and proximate result thereof, plaintiff sustained the following injuries, to wit:

Severe lacerations of his right index and middle fingers and a contusion to the right occipital region of plaintiff's scalp and contusions and abrasions to the left half of plaintiff's thorax anteriolatterally; contusions and abrasions to the right hand with fracture of a bony deformity in the right hand; and contusion to the pelvis and injury to the left hip joint located generally in the femoral triangle region continuing back to the buttock, and severe mental shock, pain and suffering, together with multiple contusions, lacerations and abrasions in and about and upon the body of said plaintiff, all of which rendered the plaintiff sick, sore, lame and disabled, and that he will suffer permanent injuries and disfigurement as a result thereof, and that by reason thereof, plaintiff has been damaged in the sum of Seventy Thousand Dollars ($70,000.00).

VIII.

That as a direct and proximate result of the said negligence and carelessness of the said defendant as above alleged, and the injuries suffered therefrom, it was necessary that the plaintiff be hospitalized and plaintiff was required to, and did obtain the services of physicians and surgeons, nurses, hospital and medical care and will be required to expend further sums for the same in the future; that the amount thereof is not now known to plaintiff, and plaintiff prays

leave to amend this complaint when the sums so expended are ascertained.

IX.

That further, as a direct and proximate result of the said negligence and carelessness of the said defendant, as above alleged, and the damages sustained to plaintiff's 1955 Cadillac sedan automobile, plaintiff has been caused to expend sums of money to repair said automobile, and by virtue of said damage to said automobile, the same has depreciated in value and plaintiff has therefore been damaged in the sum of Sixteen Hundred Fifty Dollars ($1,650.00) by virtue of the costs of said repairs and the depreciation in value of said automobile as aforesaid.

X.

That further, as a direct and proximate result of said negligence and carelessness of defendants as above alleged, plaintiff was caused to become obligated to pay the expenses of towing his automobile so as to remove same from the place of accident to the repair shop and for the loss of use of said automobile, causing him to disburse sums of money to secure the use of another car while his automobile was being repaired, the exact amount of which expenses are presently unknown to the plaintiff who prays leave of this Court to insert the said sum at this place when the same becomes known to plaintiff.

Wherefore, plaintiff prays judgment against defendants for the sum of Seventy Thousand Dollars

($70,000.00) General Damages, for the sum of Sixteen Hundred Fifty Dollars ($1,650.00). Special Damages represented by the damage done to plaintiff's automobile, and for such other special damages and sums of money as plaintiff shall expend for medical care, including doctors, nurses, hospital, ambulance, X-rays, and for his cost of tow service and loss of use of automobile during the period it was being repaired, and for such other and further and different relief as to the Court may seem just and equitable in the premises.

Dated:

Barnett & Robertson, Charles J. Miller,
By Charles J. Miller,
Attorneys for Plaintiff.

State of California,
County of Sacramento—ss.

Charles J. Miller, being first duly sworn, deposes and says:

That he is an attorney at law admitted to practice before all courts of the State of California and has his office in the County of Sacramento, State of California, and is an attorney for plaintiff in the above entitled action; that plaintiff is unable to make the verification because he is absent from said County and for that reason affiant makes this verification on plaintiff's behalf; that he has read the foregoing Complaint and knows the contents thereof, and the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief; and as to those matters he believes it to be true.

Charles J. Miller.

Subscribed and sworn to before me this 5th day of April, 1956.

Thomas Wallner,
Notary Public in and for said
County and State.

AFFIDAVIT OF SERVICE BY MAIL
(C.C.P. 1013A)

(Must be attached to original or a true copy of paper served)

State of California
County of Sacramento—ss.

No. 7317

Emmy Lou Stevenson, being sworn, says that she is a citizen of the United States, over 18 years of age, a resident of Sacramento County, and not a party to the within action.

That affiant business address is 926 J Building, Sacramento 14, California. That affiant served a true copy of the attached Notice of Motion to Amend Complaint, Motion to Amend Complaint, and Second Amended Complaint by placing said copy in an envelope addressed to Devlin, Diepenbrock & Wulff at his office address 414, 926 J Building, Sacramento 14, California, which envelope was then sealed and postage fully prepaid thereon, and thereafter was on April 6, 1956, deposited in the United States mail at Sacramento, California. That there is delivery service by United States mail at the place so addressed, or regular communication by United States mail between the place of mailing and the place so addressed.

Subscribed and sworn to before me on April 6, 1956.

Emmy Lou Stevenson.

Charles J. Miller,
Notary Public in and for said
County and State.